Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 12-68
Revision of the Commission's Program	)	
Access Rules	)	

REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, LLC

Tara M. Corvo
Mary C. Lovejoy
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY
AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for Discovery Communications, LLC

January 14, 2013

TABLE OF CONTENTS

INTRODUCTION 1

I. COMMENTERS PRESENT NO GOOD REASON TO AMEND THE DEFINITION OF BUYING GROUP..3

II. PROGRAMMERS SHOULD NOT BE REQUIRED TO ALLOW ANY MVPD TO PARTICIPATE IN A MASTER AGREEMENT..7

III. PROGRAMMERS SHOULD NOT BE REQUIRED TO PROVIDE BUYING GROUPS STANDARDIZED RATE SCHEDULES 10

CONCLUSION...12

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 12-68
Revision of the Commission's Program Access Rules	)	
	)	

REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, LLC

Discovery Communications, LLC ("Discovery") hereby submits these reply comments in response to the Further Notice of Proposed Rulemaking ("*FNPRM*" or *"Further Notice"*) in the above-captioned proceeding.[1/]

INTRODUCTION

Discovery agrees with commenters challenging the necessity and utility of the changes to the program access rules' buying group requirements proposed by the American Cable Association ("ACA"). Adoption of the proposed changes would conflict with Commission precedent, disregard purposes underlying the buying group eligibility requirements, saddle programmers with additional and unwarranted business risks, and distort competition in the programming marketplace.

First, none of the commenting parties have provided evidence that the existing rules have failed to protect legitimate buying groups or their members. The entire premise of ACA's proposal is that one organization, the National Cable Television Cooperative ("NCTC"), chooses

1/ *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Further Notice of Proposed Rulemaking, FCC 12-123 (Oct. 5, 2012) ("*Further Notice*").

not to meet the Commission's buying group liability requirements and so may not avail itself of the program access rules. But based on the initial comments, there is simply no good reason to change the rules to permit entities such as NCTC to enjoy the benefits of the program access rules without also undertaking the necessary steps to provide equal value to participating programmers. Programmers should not be compelled to afford NCTC the benefits associated with negotiating as a unitary purchaser unless NCTC is also willing to assume the responsibilities accompanying that status, which include serving as a unitary guarantor of the financial liability of the members of the buying group.

Second, the initial comments provide insufficient justification for ACA's proposal to require programmers to permit any buying group member to opt into a master agreement, regardless of its individual circumstances. The proposal ignores the highly individualized and variable nature of carriage agreements and applies a one-size-fits-all approach to a complex process. This approach would inevitably lead to significant market distortions, as MVPDs would be permitted to bypass the negotiation process entirely, and would exacerbate existing inequities in the video programming marketplace.

Third, the Commission's proposal to require programmers to provide standard rate cards based solely on potential subscribership levels is wholly unworkable and reflects a basic lack of understanding of how programmers derive the prices in their agreements. Unlike individual MVPDs, NCTC does not offer guaranteed subscriber numbers in its negotiations. Instead it negotiates based on the number of *potential* subscribers that its members might provide if they opt into the master agreement. The Commission has previously determined that requiring a standard rate card based on potential subscribers would "impose an excessive constraint on vendors" and would cause real competitive harms.[2/] There is simply no legal or factual rationale for the proposed requirement.

I. COMMENTERS PRESENT NO GOOD REASON TO AMEND THE DEFINITION OF BUYING GROUP

The Commission should reject ACA's proposal to allow entities to enjoy the benefits of negotiating as a buying group – which include filing program access complaints – without also assuming the responsibilities attendant to that status. As AMC and Comcast observe, ACA's proposal effectively eliminates all financial liability on the part of the buying group while offering programmers no reciprocal value or benefit.[3/] Programmers are willing to deal with buying groups, giving them the benefit of volume discounts even though they are not a single entity, because there is significant value in dealing with a single point of contact – the buying group – rather than multiple small entities. This value stems not only from the initial negotiation of the terms of carriage, but also from resolution of any issues that arise under the contract, including payment and collection issues. Indeed, the Commission's initial Program Access Order recognized that "to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance."[4/] There is no reason to change the rules to allow NCTC to qualify as a buying

[2/] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and* Carriage, First Report and Order, 8 FCC Rcd 3359, ¶ 113 (1993) (*"1993 Program Access Order"*).

[3/] *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of AMC Networks, Inc. at 5 (filed December 14, 2012) ("AMC") ("ACA's proposed definition would effectively eliminate all financial liability on the part of the buying group."); Comments of Comcast Corporation and NBC Universal Media, LLC at 19 (filed December 14, 2012) ("Comcast") (observing that under the proposed rule "NCTC would, in direct contradiction of the Communications Act and the Commission's rules, obtain the advantages of unitary treatment without offering vendors similar advantages or benefits as a single purchaser.") (internal citations omitted).

[4/] *1993 Program Access Order* ¶ 114.

group entitled to bring program access complaints if it is not willing to fulfill the obligations assumed by all other entities contracting for distribution licenses.

The program access rules related to buying groups are designed to provide a remedy for a buying group only to the extent that the buying group stands in the position of its MVPD members.[5/] Dealing with NCTC is very different from dealing with such a buying group. NCTC's value does not stem from its position as a single point of contact for its agreement. It does not ensure the compliance of its members to the terms of its agreements, nor does it perform adequate member screening regarding the ability to pay under the terms of agreements they enter into. As Comcast puts it, "NCTC, however it may style itself, is not a single entity, but a consortium of multiple providers."[6/] In other words, dealing with NCTC offers none of the benefits of volume associated with buying groups.

Given its general unwillingness to act as single point of contact for most of the elements of its programming transactions, NCTC should not be allowed to self-select only those aspects of buying group status that afford it benefits and advantages. As Comcast states, "If NCTC wants the benefit of litigating under the rules, it should assume the liability responsibilities associated with its contracts."[7/] Indeed, the Commission has previously rejected similar proposals that would limit the liability of the buying group as unfair to programmers, observing that:

5/ Comcast at 18 ("The program access rules are, and have always been, intended to cover the MVPDs that may be harmed by a cable-affiliated programmer's discriminatory practices. Accordingly, the rules provide a remedy for a buying group only to the extent that the buying group stands in the position of its MVPD members when it contracts with a programmer and is itself bound by the contract terms.").

6/ Comcast at 19-20.

7/ Comcast at 19; s*ee also* AMC at 7 ("If NCTC wishes to, it may avail itself of the program access rules at any time by satisfying the liability requirements of Section 76.1000(c)(1) – as may any individual MVPD at any time it believes its rights have been violated. The fact that NCTC chooses to protect itself by acting as no more than an intermediary or billing and collection interface between the programmer and the member company does not mean that the rules require amendment.") (internal quotes and citations omitted).

> "The reason smaller MVPDs enter buying groups is to obtain programming at a discount resulting from the group's aggregate purchasing power. In return for this discount, programming providers are entitled to protection that dealing with such groups will not be exposed to excessive financial risk or excessive expense such as having to routinely collect delinquent programming fees from individual buying group members. While Satellite Distributors proposed approach affords buying groups the advantages of aggregate purchasing power, it affords the programming provider with no more protection or cost savings than if the programming provider had contracted individually with each buying group member."[8/]

Significantly, commenters have failed to provide evidence that the change ACA proposes is necessary for a fair and competitive video programming distribution marketplace. Instead, they argue only that the existing rule clashes with NCTC's preferred business model and therefore should be changed.[9/] According to ACA, "[t]he FNPRM correctly finds that current liability requirements fail to reflect current industry practices and have had the unintended effect of barring some groups from availing themselves of program access protections."[10/] Contrary to ACA's assertion, the very purpose of the liability requirement is to limit the program access

---

8/ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage1998*, Report and Order, 13 FCC Rcd 15822 ¶ 76 (1998).

9/ *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of the Independent Telephone & Telecommunications Alliance at 16-17 (filed December 14, 2012) ("Although the Commission's rules contemplate program access protections for buying groups based on the level of liability the buying group assumes on behalf of its member MVPDs, the Commission's criteria do not reflect current industry practice."); Comments of Cox Communications, Inc. at 12 (filed December 14, 2012) ("The *FNPRM* properly recognizes the comments of ACA and other MVPDs, which demonstrated that the current liability rules have precluded MVPDs from banding together in effective, statutorily protected buying groups. This has deprived buying cooperatives like NCTC of the ability to claim the full protections from discriminatory pricing that Congress intended to afford to buying groups and their members."); Comments of Mediacom Communications Corporation at 4 (filed December 14, 2012) ("[T]he Commission has adopted a definition of the term "buying group" that does not take into account how buying groups actually operate in the video marketplace.").

10/ *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of the American Cable Association at 4-5 (filed December 14, 2012) ("ACA").

protections to those entities that are willing to balance the financial risks by standing in the place of their members.

ACA also erroneously asserts that revising the definition in this manner will not subject programmers to greater financial risk.[11/] As AMC Networks stated in its initial comments, "[i]n eliminating the financial obligations of the buying group, ACA's proposal shifts all of the financial risk onto the cable-affiliated programmer, who no longer has the option to decline to enter into an agreement with the group."[12/] For example, if a small MVPD member of a buying group falls delinquent in its payments, the cost of recovering that lost revenue from the MVPD may be greater than the licensing fees actually owed to the programmer. If multiple members of a buying group similarly default on their payments, the programmer will be left with no practical remedy, as the cost of pursuing each claim in serial fashion may be greater than the possible recovery. One of the purposes of dealing with a buying group is to eliminate the risks associated with smaller programming agreements by consolidating these transaction costs so that pursuing delinquent fees is a viable option. It should remain the responsibility of the buying group to ensure that those financial obligations are met.

The proposal is particularly pernicious because it subjects one subset of video programmers to increased financial risk while permitting others the flexibility to demand financial guarantees from a buying group or decline to deal with entities that are unwilling to assume such responsibilities.[13/] The disparate impact of ACA's proposal will distort the

---

[11/] ACA at 5 ("The Commission is also correct in concluding that revising the definition of a buying group in this manner would not subject programmers to greater financial risk when contracting with a buying group than when contracting with an individual MVPD.").

[12/] AMC at 6.

[13/] *Id.* ("It would be particularly inequitable to compel cable-affiliated programmers to deal with such an entity, while their unaffiliated programmer competitors remain free to insist on firmer financial guarantees as a condition of doing business.").

competitiveness of the programming marketplace by forcing cable-affiliated programmers to take on the risks of doing business with an entity that will not guarantee the financial obligations of its members, while preserving the discretion of unaffiliated programmers to decline to assume such risks.

II. PROGRAMMERS SHOULD NOT BE REQUIRED TO ALLOW ANY MVPD TO PARTICIPATE IN A MASTER AGREEMENT

Discovery agrees with commenters that oppose changing the program access rules to restrict cable-affiliated programmers from entering into individualized license agreements with distributors by granting all MVPDs below a 3 million subscriber threshold a government-guaranteed right to opt into a buying group's master agreement. Most agreements with MVPDs are highly individualized, reflecting the unique relationship between the specific programmer and the specific MVPD. As AMC notes, a programmer has "legitimate pro-competitive reasons for seeking to enter into an individualized, bilateral agreement with an MVPD," as "there are many terms and provisions that vary according to an MVPD's individual circumstances."[14/]

First, ACA's proposal to grant automatic access to a master agreement to any MVPD with fewer than three million subscribers and to any larger MVPD that obtains a significant portion of its programming through the buying group does not reflect the realities of the video programming marketplace. A video programmer can derive many different forms of value from an agreement with a larger MVPD, and therefore agreements with larger MVPDs tend to be fairly complicated. Master agreements suitable for smaller MVPDs, by contrast, are relatively simple. It would be inappropriate under any circumstances to force programmers to eschew bilateral agreements with any MVPD, but the size of the "safe harbor" proposed by ACA is particularly harmful as it still allows many of the nation's largest MVPDs default rights to opt

---

14/ AMC at 8.

into an agreement negotiated for an aggregation of small distributors, none of which may be willing to, or capable of, undertaking obligations expected of larger distributors. As Comcast observes, the three million subscriber threshold serves only to encourage NCTC's largest members to participate in more of its master agreements, which appears to be ACA's driving force in selecting it.[15/] The Commission need not amend its rules simply to promote NCTC's business practices.

Second, the proposal would lead to imbalanced negotiations and a distorted marketplace. Allowing virtually any MVPD to automatically opt into a buying group master agreement would place cable-affiliated programmers at a distinct disadvantage, since MVPDs negotiating opposite them would never face the risk of losing access to the programming if they fail to negotiate in good faith. As AMC observes, many MVPDs would use the guaranteed contract as a starting place for negotiations and seek to compel better deals than their value to the programmer may warrant.[16/] Disrupting the marketplace by creating rules that weigh heavily in favor of MVPDs and harm cable-affiliated programmers would damage competition, and would lead to lower quality programming for consumers.

Further, ACA's proposal deprives programmers of the very basic right to amend the terms of an MVPD contract based on the MVPD's past history with that programmer. If the buying group is not liable for its members' financial obligations, programmers must be permitted

---

[15/] Comcast at 23 ("ACA does not point to any evidence of actual negotiating disadvantages or inability on the part of NCTC members to participate in master agreements. Rather, its proposal seems aimed at encouraging NCTC's largest members to participate in NCTC's master agreements.").

[16/] AMC at 8 ("If an MVPD is permitted to opt into a buying group's master agreement, regardless of that MVPD's individual circumstances, the terms of that master agreement necessarily become the *de facto* starting point for all individual negotiations. MVPDs will have all the leverage in those negotiations because they face no threat of being deprived of the programming: any MVPD that cannot secure what it perceives to be a better deal than that given to a buying group may simply fall back on the master agreement in order to avoid a programming disruption.").

to make their own assessments about the credit-worthiness of individual MVPDs and draft terms that reflect that assessment, and not be forced to rely on NCTC's assessments, which have frequently proven inadequate. If a programmer has unresolved issues with an MVPD under an agreement which then expires, it would not normally enter into a new agreement without resolution of the outstanding issues and terms to ensure the problem does not repeat itself. If the MVPD can simply opt into a master agreement rather than deal with the programmer, the programmer is left without resolution of those issues. NCTC has not been willing to undertake the responsibility of serving as a point of contact for such issue resolution, and so should not be permitted to force programmers to deal with MVPDs that have proven themselves to be unreliable.

Allowing MVPDs automatic access to NCTC's master agreements will also lead to greater consolidation of market power and will create serious antitrust concerns. When the Department of Justice ("DOJ" or "the Department") reviewed NCTC's procedures in 2003, NCTC member systems ranged in size from fewer than 100 subscribers to almost 190,000 subscribers, and NCTC's membership served less than 16% of all households in the United States that subscribe to MVPD services.[17/] These factors played a significant role in the DOJ's determination that NCTC's joint purchasing procedures would not have anticompetitive effects, and the Department made clear that if there were any significant changes to the membership – "if, for example, a major MSO or a DBS provider were to join NCTC or there were other significant changes to NCTC's active membership," – that determination may be subject to

[17/] Department of Justice, Antitrust Division, Letter Response to Business Review Letter Request by The National Cable Television Cooperative, Inc. (October 17, 2003).

change.[18/] According to ACA, NCTC membership currently includes four major MSOs, each with more than 3.25 million subscribers, and at least one additional member with more than 1.25 million subscribers.[19/] NCTC has clearly experienced exceptional growth over the past ten years, and it now represents a much larger percentage of the marketplace than it did when the DOJ reviewed its practices. If MVPDs are permitted automatic access to NCTC's master agreements, NCTC's membership – and its corresponding market power – will continue to swell, leading to serious market distortions and competitive harms.

III. PROGRAMMERS SHOULD NOT BE REQUIRED TO PROVIDE BUYING GROUPS STANDARDIZED RATE SCHEDULES

ACA's proposal to require programmers to provide standard rate cards based solely on potential subscribership levels is wholly unworkable and reflects a basic lack of understanding of how programming rates are set.

ACA argues that the lack of a rate schedule results in a "chicken and egg" problem where buying group members do not opt into agreements because they believe the rates are too high, even though those rates would go down if all such members opted in.[20/] Discovery agrees with Comcast that the "chicken and egg" problem described in the *FNPRM* is not due to lack of a rate schedule, but rather due to NCTC's refusal to offer guaranteed subscriber numbers.[21/] NCTC has steadfastly refused to make any sort of subscriber commitments and will bargain only on the

---

18/ *Id.* ("If the conditions you have presented are substantially changed – if, for example, a major MSO or a DBS provider were to join NCTC or there were other significant changes to NCTC's active membership – the conclusions we have drawn would no longer necessarily apply.").

19/ ACA at 22 ("The four largest members of the NCTC are Cox, Charter, Verizon and Cablevision. Each of these MVPDs has more than 3.25 million subscribers. The next largest member of the NCTC is Cequel (d/b/a/ Suddenlink), which has 1.25 million subscribers.").

20/ *FNPRM* at ¶ 99.

21/ *FNPRM* at ¶ 99 ("ACA maintains that its proposal 'will solve the 'chicken and egg' problem that might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high, even though the license fees would go down if the members decided to opt in.").

basis of *potential* subscribers the group might provide depending on which MVPD members opt into the master agreement.

Programmers should not be forced to pre-negotiate based on hypothetical subscriber numbers without any reference to the multiple "puts and takes" that an MVPD makes across the range of issues contemplated when negotiating a deal.[22/] Forcing them to do so would put them at significant competitive disadvantage in the marketplace, as against both MVPDs, who would be guaranteed a price from which they could negotiate, and as against programmers not subject to the rules, with whom Discovery must compete.

As AMC points out, the Commission has already rejected a similar rate card requirement, noting that it "would impose an excessive constraint on vendors – thus increasing the possibility of limiting the sale of programming – and could diminish competitive pricing for multichannel programming through a standardization of higher programming rates as vendors become more aware of the pricing practices by competitors."[23/]

Comcast is correct that "requiring a rate schedule for varying levels of potential subscribership is simply not contemplated, and certainly not required, under Section 628(c) or any other portion of the program access rules,"[24/] and none of the comments in support of the proposal provide any compelling factual or legal rationale for such a requirement. Adopting such a rule would add an unnecessary layer of regulation, as parties are free to bargain for such a rate schedule if they so wish.

22/ Comcast at 21-22. ("There are numerous "puts and takes" that an MVPD makes across a range of issues in negotiating a deal, such as duration of the contract, packaging and distribution commitments, commercial availabilities, Video on Demand ('VOD') and online video rights, and branding and security issues.").

23/ AMC at 14, citing *1994 Program Access Order* ¶ 186.

24/ Comcast at 22.

CONCLUSION

For the foregoing reasons, the Commission should reject the proposed modifications to the program access rules relating to buying groups described in the *Further Notice*.

Respectfully submitted,

/s/ Tara M. Corvo_______________
Tara M. Corvo
Mary C. Lovejoy
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for Discovery Communications, LLC

January 14, 2013